BURDEN OF PROOF AND EXTENSIVE EVIDENCE IN ESTABLISHING WILLS.—Three recent cases may be grouped to illustrate the confused state of the cases on the establishment of wills. *Adams* v. *Cooper* (Ga. 1918), 96 S. E. 858, holds that the burden of proof on an issue arising upon the propounding of a will, in the first instance, is upon the propounder. When he has made out a *prima facie* case the burden of proof shifts to the caveator to prove the validity of the objections to the will. *Leahy* v. *Timon,* (Tex. 1918), 204 S. W. 1029, holds that, notwithstanding suspicious circumstances as to the making of a will, the burden of proof rests upon the contestants throughout. Both cases admit parol evidence as the proof by which the will is to be established or defeated, as does the case of *Ladd* v. *Whitledge* (Tex. 1918), 205 S. W. 463.

On the first question, the burden of proof, the *Leahy* case seems sound. There is no real shifting of burden of proof. The party on whom it rests in the first instance always has the burden of establishing his contention by a preponderance of evidence. The other party succeeds if there is a balance; the weight need not be with him, though it must not be against him. The burden of proceeding often shifts. There is a conflict of authority as to whether this burden of proof in the first instance rests on the propounder of the will. Unless there is some presumption that a paper on its face purporting to be the last will and testament of the deceased is not what it purports to be it would seem that this burden should be, at the start and throughout, on the contestant. Good reasons can be offered for placing that burden on either party. But unless it is always on the propounder there seems no good reason for putting it upon him because there are suspicious circumstances, such as that the chief beneficiary has been in very confidential relations with the deceased. Even then the case is not like confidential relations *intra vivos,* where every transaction, between principal and agent, for example, seems unnatural and calls for explanation. In the case of wills suspicious circumstances may cause the court to scrutinize the will and the circumstances carefully, but not to change the burden of proof. In any event the case of *Adams* v. *Cooper,* seems wrong in recognizing a shifting of burden of proof. The conflict cannot be settled, and we may dismiss this phase of the cases by referring to previous notes: 13 MICH. L. REV. 63, 12 *ibid.* 423, 11 *ibid.* 513, 9 *ibid.* 169, 1 *ibid.* 423.

A more interesting and troublesome question is the admission of parol or extrinsic evidence in proving a will. Here we find some conflict, but a great deal more confusion, in the cases. At the common law wills, insofar as they might be made, might be and very commonly were oral. Even the 32 Henry VIII (1540) enacted that one might will or devise by will in writing, or otherwise, and this remained true until 29 Charles II (1677), when the Statute of Fraud required that wills should be in writing. The first rule of construction is that the intention of the testator governs, and since 1677 that intention must be in writing, in the manner prescribed by the statute, and the intention must be gathered from the language of this writing. Parol evidence, and this may cover extrinsic written evidence, cannot be introduced to add to, contradict or vary the contents of the within will. Many cases

say "contradict, add to, or explain" the contents. *Nevins* v. *Martin*, 30 N. J. L. 465. In applying these rules courts often overlook the fact that words are but symbols and have to be explained, and this always calls for some extrinsic evidence, no matter how simple and clear the language used. A bequest to John Smith is impossible of execution until extrinsic evidence shows who John Smith is. A devise of the N. W. ¼ of the N. W. ¼ is an empty phrase until extrinsic evidence identifies that piece of land. It is not only wrong to say parol evidence is inadmissible to explain the provisions of a will, those provisions mean nothing until so explained. Indeed that a given writing is a will at all can be established, and is always established, more or less by parol.

The rigid rule in force before about 1800 supposed language had a fixed meaning, and that this meaning could be found in the instrument alone, in its four corners (Lord ELDON). So Lord HOLT thought the court could not have the will and travel in the affairs of the testator, and Lord COKE that the court should know by the written words of the will. By 1800 we find Lord COLERIDGE saying that a devise of Blackacre requires evidence to show what tract of land is Blackacre. All this is set forth at large and with ample illustration in WIGMORE ON EVIDENCE, sections 2470 ff., and in a monographic note in Ann. Cas. 1915 B 8. It is now generally admitted that extrinsic evidence is admissible to determine whether a given writing is a will; to determine the subjects and objects of bequests and devises; to show surrounding facts and circumstances so as to put the court in the position of the testator; to explain latent ambiguities; and to rebut a resulting trust. This last is of small consequence in this country, and the first three are so generally accepted and applied as to call for no special mention. They are illustrated in each of the cases under consideration, especially in *Ladd* v. *Whitledge, supra,* notwithstanding the court is "not so sure that any evidence was necessary." The argument of the court all relies on extrinsic evidence to show whether the Daniel Avery mentioned in the will was Sr. or Jr., and the court reaches its conclusion on this from evidence as to the relations of the testatrix to parties that would be affected by the interpretation. See also *Northrup* v. *Columbia Lumber Co.,* 186 Fed. 770; *Van Gallow* v. *Brandt,* 48 Mich. 642. The burden put upon the propounder of the will by the Georgia court in *Adams* v. *Cooper, supra,* calls for extrinsic evidence to attack as well as sustain the position of the propounder. That a statute is involved in no way affects this phase of the law, but only the purpose for which extrinsic evidence may be considered.

The interesting and conflicting and confusing cases on extrinsic evidence arise under the head of latent ambiguities, especially when the evidence showing such ambiguities indicates mistake on the part of the testator. There is no question that extrinsic evidence is admissible to show fraud or undue influence, because, say the courts, in such cases the instrument is not the will of the deceased, but the will of another imposed upon him. But when a mistake is shown it is equally certain the writing is not the will, and there is usually a fair inference that if the mistake were struck out the remainder is not the will as it would have been written by the testator, and therefore not

the will of the testator. The question is whether, extrinsic evidence having uncovered a latent ambiguity in the will (caused perhaps by a mistake) more extrinsic evidence may be received to remove the ambiguity (correct the mistake). In contracts *inter vivos* equity will set aside for fraud, and equally correct, a mistake by reforming the instrument so as to make it read as intended. After the death of the maker equity will set aside a so-called will for fraud, but it is said it will not reform a will for mistake. This is put upon the grounds that the only party to the instrument is dead, that there is no consideration to support the contestant, and that equity does not correct mistake unless it is mutual. But these objections are artificial and technical, and do not cover the merits. What is equity for? Why should it not correct a mistake which is not mutual in instruments that have no mutuality, which is not supported by consideration in writings in which consideration plays no part, in instruments made by a party who is now dead in the case of wills which have vitality only after the death of the maker? There is only one objection that is not purely artificial, and that is the danger of fraud if courts open wills to attack by extrinsic, and perhaps manufactured and false evidence, when the maker of the instrument, who alone, perhaps, knows the facts, is dead, and so many years have elapsed since the execution of the will that memory of witnesses is unreliable. *Nevins* v. *Martin,* 30 N. J. L. 465, where the witness was testifying as to the facts of the making of a will eighteen years before.

It must be admitted at once that this is a grave peril, and calls for the exercise of great caution. But shall the fear of wrong become an instrument of wrong? If the courts refuse to correct a mistake where the mistake and correction are not so clear as to leave no room for doubt in the mind of the court, why should it not be corrected when there is such clearness? The answer is that corrections are made, actually if not admittedly. Indiana in an early case, *Judy* v. *Gilbert,* 77 Ind. 96, refused to correct a description in a will reading "N. E. ¼ of the S. W. ¼," upon evidence that the testator never owned such land, but did own, and beyond a doubt intended to devise the "N. E. ¼ of the S. E. ¼." But in *Pate* v. *Bushong,* 161 Ind. 533, a will was in effect corrected by being applied to Section 29 instead of 28, and by striking out "W" in S. W. ¼ and then by parol showing which S ¼ was meant, a very artificial way to accomplish a very evident end. This overruled *Judy* v. *Gilbert.* Illinois has undertaken the impossible task of reconciling *Kurtz* v. *Hibner,* 55 Ill. 514, *Gingel* v. *Volz,* 142 Ill. 214, with *Whitcomb* v. *Rodman,* 156 Ill. 116. See *Huffman* v. *Young,* 170 Ill. 290 and *Hitchcock* v. *Board of Missions,* 259 Ill. 288, Ann. Cas. 1915 B 1, and extended note. For a similar reversal in Wisconsin see *Sherwood* v. *Sherwood,* 45 Wis. 357 and *Hanley* v. *Kraftczyk,* 119 Wis. 352. Perhaps the leading case permitting correction is *Patch* v. *White,* 117 U. S. 210 in which a five to four vote upheld changing "lot 6, square 403," which testator never owned, to "lot 3, square 406," which he did own and intend to devise. As to corrections of mistakes in naming beneficiaries see annotation to *Siegley* v. *Simpson,* 73 Wash. 69, 47 L. R. A. N. S. 514.

None of these cases in terms admit that a court can correct a mistake

in a will, and many mistakes no doubt would not be corrected. But why not in any perfectly clear case? There is no good reason for exceptional treatment of mistakes in the description of the subject or object of the bequest, unless it be claimed that proof is clearer in these cases, and it is easy to limit the rule in this way. See *Whitehouse* v. *Whitehouse,* 136 Ia. 165, in which this distinction is followed. See also *Covest* v. *Sebert,* 73 Ia. 564. In *Adams* v. *Cooper, supra,* the claim was a mistake of fact as to the existence or conduct of heirs, which under the Georgia statute should be corrected. This is of course mistake *dehors* the will, leading to a disposition contrary to what might otherwise have been made. The danger of taking evidence in such cases is as great as in attacks upon the language of the will. The extrinsic evidence in *Leahy* v. *Turion, supra,* was permitted to enable the court to put itself in the position of the testator, but here too the danger of parol evidence is as great as in other cases in which the court refuses to take the risk.

The better modern rule seems to be that if by striking out a mistake (in description) enough remains, when read in the light of the surrounding circumstances, to identify the property intended, the remaining part will be given effect in accord with the manifest intent of the testator. For many cases *contra* see 40 Am. Rep. 289 and note, 50 Am. S. R. 279 and note, 6 MICH L. REV. 520, 7 *ib.* 189. Many cases justify going further and giving effect to the manifest intention of the testator when the mistake (in description) is clear, and also the correction, though both depend on extrinsic evidence. *Patch* v. *White,* 117 U. S. 210. The effort of the Massachusetts court to escape from the narrow rule without plunging into dangerous waters is apparent in such cases as *Polsey* v. *Newton,* 199 Mass. 450, criticised in 7 MICH. L. REV. 189, *Bullard* v. *Leach,* 213 Mass. 117, criticised in 11 MICH. L. REV. 494, and *Doherty* v. *O'Hearn,* 214 Mass. 290.

The English cases of mistake have often turned on whether the will was read over to the testator and understood by him when it was executed. They had gone so far as to lay down a fixed rule that the fact that there had been no fraud, paper had been duly read over to a capable testator, or that its contents had been brought to his notice in any other way, at the time of the execution, should, when coupled with the execution thereof, be conclusive of his knowledge and approval of such contents. *Guardhouse* v. *Blackburn,* L. R. 1 P. & D. 109. But the House of Lords refused to sanction any rigid rule, preferring to consider each case on its facts. *Fulton* v. *Andrew,* 7 H. L. 448. A number of English cases correct mistakes on no other apparent ground than that the correction is by consent of all parties interested. *Goods of Lady Gordon,* 17 P. D. 228, *Goods of Boehm,* [1891] P. 247. But extrinsic evidence as to whether a will was read over is subject to all the objections to extrinsic evidence, notwithstanding a reading over "creates a strong persumption that the testator knew." *Gregson* v. *Taylor,* [1917] P. 256. Evidence as to whether a will was read over to the testator is about as uncertain and unreliable, and opens the door as widely to fraud, as any form of evidence. Often extrinsic evidence admits no doubt of the testator's intent, *i. e.,* where he has attempted to dispose of all his property, but by a misdescription

has included a parcel he never owned, and has omitted one he did own but did not otherwise dispose of. *Patch* v. *White, supra.*

It is submitted that insofar as it is regarded to be safe to admit extrinsic evidence to show that a given paper was not the testator's will, or that it was induced by fraud or undue influence, it ought also to be safe by the same evidence to show mistake, and that within the same restrictions, it should be received not merely to show mistake but to enable the courts to make the correction. The courts profess not to be able to do this, and yet, as has been shown, for many purposes they actually do. See, for example, *Polsey* v. *Newton,* 199 Mass. 450. Compare *Delano* v. *Smith,* 206 Mass. 365, in which the court expressed a fear that to admit extrinsic evidence, in the absence of fraud, might cause reforming or remodeling every will to meet the demands of disappointed heirs of legatees. The fear seems groundless if the use of extrinsic evidence is properly restricted and safe guarded. In cases where the intent of the testator is clear beyond a doubt, and has been expressed as required by statute, the courts should be able to correct the writing so that it will express this clear intent.